84-1954

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ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ROBERT MANKIN, SR., PETITIONER

V.

STATE OF OHIO

PETITION FOR A WRIT OF CERTIORARI TO THE

COURT OF APPEALS FOR ROSS COUNTY, OHIO

William H. Allyn, Jr.*
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Attorneys for Petitioner
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39pp

QUESTIONS PRESENTED

1. Whether the filing of a motion by an aggrieved person prior to trial pursuant to 18 U.S.C. § 2518 (10) (a) to test the lawfulness of the interception of wire and oral communications is a right protected by the Constitution or statutes of the United States.

2. Whether the refusal of a trial court to review the merits of a motion filed before trial and pursuant to 18 U.S.C. § 2518 (10) (a) constitutes a denial to petitioner of a right guaranteed him under the Constitution and statutes of the United States.

3. Whether Rule 12, Ohio Rules of Criminal Procedure, is repugnant to the Constitution or laws of the United States if it is interpreted to permit a trial Court to deny an aggrieved party the right to file a motion before trial pursuant to 18 U.S.C. § 2518 and to have the same considered on its merits.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO.

ROBERT MANKIN SR., PETITIONER

V.

STATE OF OHIO

A writ of certiorari is respectfully sought by petitioner to review the decision of the Court of Appeals for Ross County, Ohio, affirming his criminal conviction in the Common Pleas Court of Ross County, Ohio.

OPINIONS BELOW

This matter originated in the Court of Common Pleas of Ross County, Ohio. A ruling (Appendix A) striking the petitioner's motion to suppress evidence obtained by alleged violations of 18 U.S.C. §2510 **et. seq.** was taken to the Ohio Fourth District Court of Appeals for Ross County which remanded the cause (Appendices B and C). The Supreme Court of Ohio refused review (Appendix D) at that juncture. Upon a plea of no contest the petitioner was found guilty by the common pleas court and sentenced (Appendix E). On appeal, the court of appeals, in its opinion (Appendix F) and judgment entry (Appendix G), affirmed the trial court; and, again, the Supreme Court of Ohio denied review (Appendix H). The petitioner seeks review of the opinion and judgment of the Court of Appeals for Ross County, Ohio.

JURISDICTION

The Entry of the Supreme Court of Ohio finalizing this matter in the state's courts was rendered on April 17, 1985. Review having been refused by the high court of Ohio, the record of this proceeding rests with the Court of Appeals for Ross County, Ohio.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.§ 1257 (3).

Constitutuinal Provisions, Statutes, and Rules Involved

This case involves the following constitutional provisions, statutes and rules: U.S. Constitution, amendment IV, amendment XIV; portions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510, 2515, and 2518; Rule 12, Ohio Rules of Criminal Procedure. The pertinent texts of the foregoing are set forth in Appendix I.

STATEMENT OF THE CASE

Petitioner was indicted by the Grand Jury of Ross County, Ohio, on two counts of receiving stolen property (Ohio Revised Code §2913.51) and one count of unlawful possession of a dangerous ordinance (Ohio Revised Code §2923.17). He was arrested on March 5, 1981.

Concurrent with this arrest, two search warrants were executed by Detectives Ronald L. Nichols and William Hatfield of the Ross County Sheriff's Department. The facts relied upon by the deputies as affiants for obtaining the search warrants concerned the activities of agent Albert Mirth of the Alcohol, Tobacco, and Firearms Division of the United States Treasury Department. Most of the information pertained to the agent's attempts to purchase food stamps from petitioner. In addition, although the warrant was for specific items, several hundred items were in fact seized, among which were no food stamps, and the search and seizure, although specified for only one area, was extended to every building on the rather extended property owned by petitioner, Robert Mankin, Sr.. All information supplied by the detectives **cum** affiants in the affidavit for the search warrants was based either on recorded conversations or telephone conversations alleged to have been made by the petitioner but to which the affiants were not participants.

On May 15, 1981, petitioner filed a motion to suppress illegally obtained evidence. The prosecutor filed a motion to strike which the trial court sustained. The court's ruling turned upon its interpretation of Ohio Criminal Rule 12 (A) which provides in part that a motion to suppress evidence "* * * * shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier." Subpart (C) of that rule pro-

vides that "[f]ailure by the defendant to raise * * * objection * * * * * which must be made prior to trial, at the time set by the court, pursuant to subdivision (C), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for good cause shown may grant relief from the waiver."

Since petitioners arraignment was on March 16, 1981, the thirty-five day time limit would have expired on April 21. On April 10 the Court extended the time for discovery to April 17th and petitioner was ordered to file any motion to suppress by May 7th. The petitioner did not file his motion to suppress until May 15, 1981; and, at petitioner's request the hearing on the motion was continued. The State filed a motion to strike the motion to suppress. On July 6th the Court ordered the motion stricken as not timely filed. (Appendix A). The petitioner filed a motion to reconsider which was similarly overruled.

This ruling by the common pleas court was appealed to the Ross County Court of Appeals which, in its Opinion of October 5, 1982, (Appendix B), held that the ruling appealed from was not a "final appealable order" within the purview of Ohio Revised Code §2505.02 and that that court was without jurisdiction to review the matter at that juncture. It, therefore, dismissed the appeal (Appendix C). A "Motion for Leave to Appeal from the Court of Appeals" was filed with the Supreme Court of the State of Ohio which overruled such motion on March 2, 1983, (Appendix D).

Proceedings in the Common Pleas Court of Ross County, Ohio, which had been stayed during these appellate proceedings, the petitioner having waived speedy trial provisions, recommenced and on July 1, 1983, the petitioner submitted a new plea of no contest to the trial court. The court made a determination that the petitioner was guilty of two counts of receiving stolen property and one count of unlawful possession of a dangerous ordinance. On August 18, 1983, the petitioner was sentenced to three concurrent sentences of from six (6) months to five (5) years. (Appendix E).*

*The Sentencing Entry (Appendix E) is in error when it states that the petitioner entered guilty pleas. The "Petition to Enter a Plea" signed by the petitioner on July 5, 1983, but not properly includable in this petition, specifically states several times that the plea being entered is one of "No contest." Also, the Court of Appeals in its opinion of January 15, 1985, (Appendix F), specifically states: "Appellant entered a **plea of no contest** after the trial court denied a motion to suppress evidence." (Emphasis added.)

This Judgment Entry of Sentence was appealed to the Court of Appeals for Ross County, Ohio, which in its opinion (Appendix F) and judgment entry (Appendix G) affirmed the lower court.

Upon appeal to the Supreme Court of Ohio, that court overruled the motion to certify and dismissed the appeal sua sponte on April 17, 1985 (Appendix H).

REASONS FOR GRANTING THE PETITION

(i) The right sought to be protected by petitioner is one created by the Constitution and statutes of the United States.

Portions of Title III of the Omnibus Crimes Control and Safe Streets Act of 1968 (18 U.S.C.§2510 et seq.) provide for protection of the right contained in the Fourth Amendment to the United States Constitution that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..." in so far as wire or oral communication is concerned. To that end, 18 U.S.C.§2515 provides for the suppression of the contents of any intercepted communications or any "evidence derived therefrom in any court of a state or political subdivision thereof "* * * if the disclosure would be in violation of this chapter."

Simplistically stated this Fourth Amendment right is guaranteed to the citizens of the several states and made applicable to the states by the Fourteenth Amendment.

This right of suppression is given a method of enforcement in the Crimes Control Act. In as far as is germane to the case at bar, 18 U.S.C.§2518 provides:

> "(10) (a) Any aggrieved person in any trial * * * * or proceeding in or before any court of * * * * a state, or a political subdivision thereof, may move to suppress the contents of any were or oral communication intercepted pursuant to this chapter or evidence derived therefrom, on the grounds that----(i) the communication was unlawfully intercepted;
>
> * * * * * * * * * *

"Such motion shall be made before the trial, * * * *"

The petitioner falls within the definition of an "aggrieved person", as contained in 18 U.S.C. §2510 (q.v. Appendix I-3). And, he did file a motion before trial (in fact, before a trial date was ever set). There can be little question but that the right sought here to be protected is a right protected by the Constitution and statutes of the United States.

(ii) The decision of the Ohio Courts on the federal question is at variance with the holding of another state court of last resort.

The trial court saw fit to strike petitioner's motion to suppress, upon motion of the prosecuting attorney, as being untimely under either court order or procedural rule. The motion to suppress was, however, timely under the federal statute.

The question is very simply this:
Is the right to raise the issue of the legality of intercepted communications such a protected right that, if the issue is raised in the manner provided by statute, the court before whom the issue is raised has the duty to pass on the merits of the issue?

The question is not whether the particular motion should have been filed before trial. It was. The question of whether or not a court might properly strike a motion to suppress when it determines that an aggrieved person did not make the motion before trial even though he had an opportunity and was aware of the grounds of the motion is not presented here.

Whether or not an evidentiary hearing must be held under 18 U.S.C.§2518 is not necessarily reached. That such a hearing lies in the sound discretion of the trial court has been held by various federal circuits, U.S. v. Santora (C.A.Cal., 1979), 600 F.2d 1317, amended 609 F.2d 433; United States v. Licavoli (C.A. 9, 1979) 604 F2d613, United States v. Loring (C.A.8, 1976), 539 F2d 1174. Nor is the timing of such a hearing involved here. The language of the statute makes clear that the motion to suppress should, in most cases, be filed prior to trial; but, the lower federal courts have held that a hearing on such motion need not necessarily be had before trial, but, depending on the circumstances, might be held after trial, United States v. Buck, (C.A. Cal., 1977)

548 F. 2d871, cert. den. 434 U.S. 890; United States v. Spagnuolo (C.A. Cal., 1975), 515 F2d 818.

But, in no reported case has it been maintained that a motion filed before trial challenging the legality of evidence obtained by interception could be struck and no review made of the contents of the motion to determine the sufficiency of the challenge to the evidence sought to be suppressed or whether or not a full fledged hearing would be appropriate.

While the Supreme Court of the State of Ohio, a state court of last resort, has not directly passed on the question involved, by refusing to review the decision of the Court of Appeals for Ross County, it has let stand a decision on a federal question which appears to be in conflict with the decision on a federal question of another state court of last resort. The high court of the State of Maryland in Carter v. State (1973), 274 Md. 411, 337 A. 2d 415, has held that an evidentiary hearing is required and the refusal to give an accused an opportunity to produce evidence in support of his motion to suppress evidence obtained by electronic surveillance was error requiring, not merely remand for a hearing on that issue, but a new trial.

(iii) The Ohio Courts have given a state criminal procedural rule precedence over a right created by the Constitution and statutes of the United States.

The trial court struck petitioner's motion to suppress evidence "* * * for the reason that the defendant's motion was not timely filed." Timely filing to the trial court obviously meant in accordance with Rule 12 of the Ohio Rules of Criminal Procedure (Appendix I-6). But, the motion was not untimely under the statute codifying the right to suppress and delineating the method for doing so under 18 U.S.C. §2518 (10) (a).

The question before this Court is whether or not the procedural aspect of this right is so intrinsically tied up with the right itself that denial of the process and permitting its abrogation by procedural rules or court order amounts to an impermissible denial of the right itself. This Court has several times held that a denial of procedural due process can assume constitutional proportions.

It is this petitioner's contention that a denial by the state trial court of the substantive right afforded the petitioner by the federal statute and Constitution due to his failure to adhere to either a state enacted procedural rule or a court imposed time schedule at variance with the federal legislative scheme affording protection of the federal right is necessarily unconstitutional. Especially is this so when no countervailing state or judicial interest compeling such roughshod treatment is enunciated.

If speedy trial was threatened by the timing of the motion, a waiver could have been found implicit by its filing or made explicit at hearing. If other unmeritorious reasons were suspected for the filing of the motion, they still could have been disposed of within the statutory procedural framework and would have dealt with the merits of the motion.

The crux of this matter is, perhaps, found in the position taken by the Court of Appeals for Ross County when it considered this case on its merits (Appendix F.).

That reviewing court, after noting the petitioner's procedural shortcomings in the lower court, states that "* * * only the most compeling constitutional violation would establish good cause to grant relief from the waiver of appellant's right to move for suppression of evidence."

That court then proceeds to look at the "substance" of petitioner's claim. This approach ignores the fact that the lower court had struck the motion. It was not, in point of law, before it for review. Since appeals on fact and law in Ohio were abolished in 1971, (Rule 2, Ohio Rules of Appellate Procedure), that court's review was limited to questions of law and its determinations of factual findings with regard to the "substance" of petitioner's motion is, of necessity, obiter dictum. Since the petitioner's motion was struck by the trial court, no evidence or argument on such motion was ever before a court and the appellate court's surmising as to its probable contents is just that—surmising.

More important is the appellate court's standard for granting relief from the petitioner's alleged waiver; that is, "only the most compelling constitutional violation would establish good cause." No authority is given for this statement. It is difficult

to imagine a "constitutional violation" which is not "most compelling."

Absent a showing of a compelling state interest, the statutorily prescribed procedural methods for asserting a federal staturory and constitutional right must take precedence over a state procedure for asserting such right. To the extent that it is judically interpreted to permit such application, Rule 12 of the Ohio Rules of Criminal Procedure is unconstitutional.

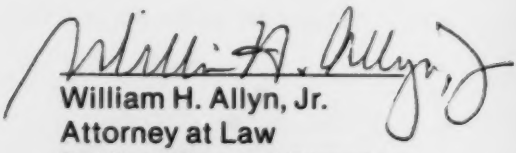
While the decision to hold evidentiary hearings on motions to suppress evidence obtained by electronic surveillance might properly rest with the trial judge, depending upon the issues raised, the motion, if filed within the procedural mandates of the statutory scheme, must be decided in an adversary context; that is, the movant must at least be given the opportunity to present written or oral argument in support of his position, United States v. Manuszak (E.D. Pa., 1977), 438 F. Supp. 613, and the same must be considered on its merits.

This would seem to be a minimally acceptable standard.

Conclusion

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for Ross County, Ohio.

Respectfully Submitted,



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Robert Mankin, Sr.

APPENDIX A

ENTRY & ORDER OF THE COURT OF COMMON PLEAS OF ROSS COUNTY, OHIO, OF JULY 14, 1981

IN THE COURT OF COMMON PLEAS

ROSS COUNTY

STATE OF OHIO

Plaintiff,

vs

ROBERT MANKIN

Defendant.

Case No. 81 CR 58

JUDGE MOWREY

ENTRY

On the 6th day of July, 1981, this matter came on for hearing upon the defendant's motion to suppress evidence filed May 15, 1981 and the State of Ohio's motion to strike the defendant's motion to suppress evidence filed May 19, 1981 for the reason that the defendant's motion was not timely filed. After careful consideration of this matter and the arguments of counsel, it is the order of the Court that the State of Ohio's motion to strike the defendant's motion to suppress from the record is hereby sustained and the defendant's motion to suppress evidence is hereby stricken, to all of which the defendant excepts.

It is a further order of the Court that counsel for the defendant comply with the Court's order of May 15, 1981 by providing reciprocal Discovery to the State of Ohio by July 8, 1981.

/s/ Valla B. Mowrey, Jr.

JUDGE VALLA B. MOWREY, JR.
Common Pleas Court
Ross County, Ohio

APPROVED:

/s/ Jack C. Kellenberger

JACK C. KELLENBERGER
Assistant Prosecuting Attorney
Ross County, Ohio

/s/ J. Donald Ratcliff

J. DONALD RATCLIFF
Attorney for Defendant

/s/ Richard B. Middleton

RICHARD B. MIDDLETON
Attorney for Defendant

APPENDIX B

OPINION OF OCTOBER 5, 1982, OF THE COURT OF APPEALS FOR ROSS COUNTY, OHIO

COURT OF APPEALS, ROSS COUNTY, OHIO

STATE OF OHIO

Plaintiff-Appellee

Case No. 922

vs.

OPINION

ROBERT MANKIN, SR.

Defendant-Appellant

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Richard B. Middleton
10 E. Main St., Chillicothe, Ohio

COUNSEL FOR APPELLEE: Richard G. Ward, Prosecuting Atty.
Ross Co., Ohio
18 Foulke Block, Chillicothe, Ohio

ABELE, J.:

This is an appeal from an October 5, 1981, Ross County Common Pleas Court judgment overruling Defendant's Motion for Reconsideration of a July 14, 1981, pre-trial judgment. The Grand Jury indicted Defendant on March 13, 1981, for two counts of Receiving Stolen Property in violation of Ohio Revised Code Secton 2913.51 and one count of Unlawful Possession of a Dangerous Ordnance in violation of Ohio Revised Code Section 2923.17. The Court arraigned Defendant on Marcy 16, 1981. At an April 10, 1981, pre-trial hearing, the Court extended the Ohio Criminal Rule 12 thirty-five day time limit for filing motions to suppress until May 7, 1981.

On May 15, 1981, sixty days after his arraignment, Defendant filed his Motion to Suppress. The State moved to strike the Motion to Suppress. On July 14, 1981, the Court ordered Defendant's Motion to Suppress striken from the files.

At a September 30, 1981, pre-trial hearing, Defendant moved the Court to reconsider the July 14, 1981 judgment striking Defendant's Motion to Suppress from the files. On October 5, 1981, the Court overruled Defendant's Motion for Reconsideration.

Defendant appeals from the October 5, 1981, judgment. Plaintiff moves to dismiss the appeal.

We must dismiss Defendant's appeal because the October 5, 1981, judgment is not a final appealable order. Ohio Revised Code Section 2505.02 defines final appealable orders:

> "An order affecting a substantial right in an action which in effect determines the action and prevents a judgment, an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order vacating or setting aside a judgment and ordering a new trial is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial."

Rulings on pre-trial motions in criminal cases are generally not final appealable orders. State v. Curtis (1965) 2 0. App. 2d 31, 206 N.E. 2d 217; State v. Himelrich (1954) 100 0. App. 476, 137 N.E. 2d 297. Judgments denying of motions to suppress are not final appealable orders. State v. Wetzer (1963) 118 0. App. 368, 194 N.E. 2d 911. Judgments on motions for reconsideration are not final apealable orders. Pitts v. Department of Transportation (1981) 67 0. St. 2d 378, 423 N.E. 2d 1105.

Appellee's Motion to Dismiss is GRANTED.

APPEAL DISMISSED.

Grey, P.J.: Concur in Judgment & Opinion
Stephenson, J.: Concur in Judgment & Opinion

APPENDIX C

JUDGMENT ENTRY OF OCTOBER 22, 1982, OF THE COURT OF APPEALS FOR ROSS COUNTY, OHIO

COURT OF APPEALS, ROSS COUNTY, OHIO

State of Ohio,
Plaintiff-Appellee, No. 922

vs.

Robert Mankin, Sr.
Defendant-Appellant JUDGMENT ENTRY

For the reasons set forth in the opinion filed previously herein, i.e. that there is no final appealable order, this case is dismissed. Costs to appellant.

/s/ Lawrence Grey
Lawrence Grey,
Presiding Judge

APPENDIX D

JOURNAL ENTRY OF MARCH 2, 1983, OF THE SUPREME COURT OF THE STATE OF OHIO

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO
CITY OF COLUMBUS

1983 TERM

To wit: March 2, 1983

STATE OF OHIO,

Appellee,

No. 82-1749

vs.

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

ROBERT MANKIN, SR.,
Appellant

for Ross County

It is ordered by the court that this motion is overruled.

Costs: Motion fee, $20.00, paid by J. Donald Ratcliff.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____day of _____19_____

_____ Clerk

_____Deputy

APPENDIX E

JUDGMENT ENTRY OF SENTENCE OF AUGUST 18, 1983, OF THE COMMON PLEAS COURT OF ROSS COUNTY, OHIO

IN THE COURT OF COMMON PLEAS, ROSS COUNTY, OHIO

STATE OF OHIO

Plaintiff, CASE NO. 81 CR 58

vs. JUDGE MOWREY

ROBERT MANKIN JUDGMENT ENTRY OF SENTENCE

Defendant

On or about the 16th day of March, 1981, the defendant, Robert Mankin, represented by his attorneys Richard Middleton and J. Donald Ratcliff, and the State represented by the Assistant Prosecuting Attorney were present before the Court. At that time, the defendant, through his attorneys, entered pleas of not guilty to the Indictment charging three counts, to-wit: Counts One and Two charging Receiving Stolen Property, Section 2913.51 of the Ohio Revised Code and Count Three charging Unlawful Possession of a Dangerous Ordnance, Section 2923.17 of the Ohio Revised Code.

On or about the 1st day of July, 1983, the defendant, his attorneys and the Assistant Prosecuting Attorney were again present before the Court. Thereupon the defendant, through his attorneys, advised the Court that he had decided to enter pleas of guilty to the charges contained in the Indictment. The Court read the defendant Section 2913.51 of the Ohio Revised Code and advised the defendant that the offense of Receiving Stolen Property is a Fourth Degree Felony carrying a maximum penalty of two to five years in a penal institution and a possible fine of up to $2,500. The Court then read the defendant Section 2913.51 of the Ohio Revised Code and advised the defendant that the offense of Receiving Stolen Property as charged in Count Two of the Indictment is a First Degree Misdemeanor carrying a maximum penalty of six months in a penal institution and a possible fine of up to $1,000. The Court then read the defendant Section 2923.17 of the Ohio Revised Code and advised the defendant that the offense of Unlawful Possession of a Dangerous Ordnance is a Fourth Degree Felony carrying a maximum

penalty of two to five years in a penal institution and a possible fine of up to $2,500. The Court further inquired of the defendant:

1. Whether he fully understood the effect of his pleas of guilty and that the Court upon acceptance of his pleas, might proceed with judgment and sentence.

2. Whether the defendant understood that by entering pleas of guilty, he would be waiving his right to a trial by jury or a trial by the court, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor (power of subpoena), and the right to require the State to prove his guilt beyond a reasonable doubt at a trial before the court or before a jury where the defendant could not be compelled to testify against himself.

To each of the above inquiries, the defendant gave an affirmative answer. Thereupon, the defendant, through counsel, presented to the Court his completed petition to enter pleas of guilty, signed by both the defendant and his attorneys.

The Court, being fully satisfied that the defendant did commit the offenses of Receiving Stolen Property (2 counts) and Unlawful Possession of a Dangerous Ordnance and that the defendant fully understands the nature of the charges against him and the consequences of his pleas of guilty, found the defendant guilty as he stands charged in the Indictment.

Thereupon, the defendant was served written notice by the Court advising him that he had the choice to elect between an indefinite sentence and a definite sentence for the offenses of Receiving Stolen Property as charged in Count One and Count Two of the Indictment and the offense of Unlawful Possession of a Dangerous Ordnance as charged in Count Three of the Indictment. Further, that should the defendant elect an indefinite sentence, the minimum imprisonment for each charge would be one-half, one, one and one-half, or two years but not more than five years. If the defendant chose a definite sentence, he could be imprisoned for one-half, one, or one and one-half years. The defendant was further advised that if he refused to choose between either of the sentences, he would be sentenced pursuant to the law in effect at the time of the commission of the offense. Defendant was further advised that the written notice provided to him would have to be executed by him and returned to the Court prior to sentencing.

On August 12, 1983, the defendant again appeared in Court for sentencing and at that time, the Court found that the defendant had elected an indefinite sentence for Counts One and Three of the Indictment. The defendant was then given an opportunity to speak on his own behalf and present information in mitigation. Counsel for the defendant was given an opportunity to make a statement on behalf of the defendant. The Court finding no good and sufficient cause being shown

to mitigate the punishment and nothing being said by the defendant as to why sentence should not now be imposed, sentence and judgment was pronounced as follows: For the offense of Receiving Stolen Property, Section 2913.51 of the Ohio Revised Code as charged in Count One of the Indictment, you are hereby sentenced to the Ohio State Penitentiary for an indefinite period of not less than six months nor more than five years. For the offense of Receiving Stolen Property, Section 2913.51 of the Ohio Revised Code as charged in Count Two of the Indictment, you are hereby sentenced to the Ohio State Penitentiary for a determinant period of six months. For the offense of Unlawful Possession of a Dangerous Ordnance, Section 2923.17 of the Ohio Revised Code as charged in Count Three of the Indictment, you are hereby sentenced to the Ohio State Penitentiary for an indeterminate period of not less than six months nor more than five years and ordered to pay the costs of this prosecution for which execution is hereby awarded. It is the further order of the Court that the sentences imposed shall be served concurrently and that any bond posted is hereby released. It is the further order of the Court that you be given jail time credit in the amount of 8 days toward the sentence imposed.

/s/ Judge Val B. Mowrey, Jr.

JUDGE VAL B. MOWREY, JR.
Common Pleas Court
Ross County, Ohio

APPENDIX F

OPINION OF THE COURT OF APPEALS OF ROSS COUNTY, OHIO, OF JANUARY 15, 1985

COURT OF APPEALS, ROSS COUNTY, OHIO

STATE OF OHIO,

Plaintiff-Appellee, No. 1075

vs.

ROBERT MANKIN, SR., OPINION

Defendant-Appellant

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Suite 23, Foulke Block, Chillicothe, Ohio 45601

GREY, J.:

This is an appeal from the Ross County Court of Common Pleas, finding appellant guilt of two counts of receiving stolen property and one count of possession of a dangerous ordnance. Appellant entered a plea of no contest after the trial court denied a motion to suppress evidence.

Assignments of error 1 and 2 involve the motion to suppress:

> "I. It is error for the court to overrule the defendant (appellant) Robert Mankin, Sr.'s motion which requested the court to reconsider its previous ruling that denied the defendant the right to suppress illegally obtained evidence.
>
> II. It was error for the trial court, after a plea of no contest to find the defendant guilty upon evidence offered by the State of Ohio; that was illegally obtained evidence and based upon a search used as its probable cause for its issue illegally obtained evidence by an electronic surveillance of the appellant. The

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> court orders obtained for this eavesdropping by means of a transmitter and receiver; such a method of obtaining probable cause for a search warrant, if it were not approved by a court in and of itself, would be illegal per se."

Appellant's motion to suppress was denied not on the merits, but because it was not filed within the time limits of Cr. R. 12(C), which requires that the motion be made within 35 days of arraignment or at any other time set by the court.

Appellant's arraignment was March 16, 1981. The 35 day limit would have expired on April 21. On April 10, the court extended the time for discovery. Appellant was to complete his discovery requests by April 17th, and file his motion to suppress by May 7th. The court also set a date and time for hearing the motion, May 15th. Discovery was completed according to schedule, but appellant did not file his motion to suppress on May 7. Appellant also failed to show for the hearing scheduled for 1:00 p.m. on the 15th. Appellant's counsel was located and several hours later, about 3:30 p.m., did appear in court and filed a motion to suppress. At appellant's request the hearing was continued. The state filed a motion to strike the motion to suppress. On July 6th the court ordered the motion stricken as not timely filed.

Under Cr. R. 12(G), appellant waived his right to suppress evidence by failing to bring his motion by the date set by the court. The court may grant relief from this waiver for good cause shown, but this is a matter of discretion. State vs. Moody (1978), 55 Ohio St. 2d 64; State vs. Gibson (1980), 69 Ohio App. 2d 91; Slater vs. Johnson (6th Cir. Ohio, 1978) 579 Fed. 2d 1007. Appellant asserted that he was overwhelmed by the State's discovery response, containing a list of 127 items seized under a warrant. But he had made no attempt to view the items, to inform the Court or State of his concerns, or to request an extension. His failure to appear in court is alone sufficient grounds for rejecting his claim on procedural grounds. Even so, the trial court did not summarily overrule appellant's motion. It set a new hearing and in the interim accepted appellant's written argument.

Under these circumstances, only the most compelling constitutional violation would establish good cause to grant relief from the waiver of appellant's right to move for suppression of evidence. We have reviewed the substance of appellant's claim and find that it has no merit. Apellant's claim is that an illegal electronic transmission and tape recording was made of appellant's conversations with a U.S. Treasury Agent who purchased the stolen property and dangerous ordnance from apellant. These taped conversations were offered as probable cause for the issuance of a search warrant. Appellant argued that the transmission and recording violated his expectations of privacy and federal and state

wiretapping laws. However, both the federal wiretapping statute, 18 U.S.C. § 2511, and the parallel state statute, R.C., 1933.58 contain express permission for interception of conversations when one of the parties has consented. Appellant has cited no authority for a legitimate expectation of privacy in an oral conversation with a stranger. Since the transmission and recording of these conversations was legal, the search warrant was valid.

We therefore find no prejudicial error nor any reason for relieving appellant from his failure to timely move for the suppression of evidence. The trial court did not abuse its discretion in striking the motion or in denying appellant's subsequent request for reconsideration. Assignments of error 1 and 2 are overruled.

Assignment of error 3:

> "The defense of entrapment is established where the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order to prosecute."

This assignment of error is totally without merit. Except for the specific issues preserved under Cr. R. 12(H), a defendant pleading no contest under Cr. R. 11(B)(2), waives his right to call witnesses, testify, and present a defense. The rule clearly states that a plea of no contest is an admission of the truth of the facts alleged in the indictment. These matters are fully explained to appellant by the court prior to its acceptance of his plea, and are contained in the written plea statement signed by appellant.

The facts presented to the trial court satisfied the statutory elements of receiving stolen property and possession of a dangerous ordnance, and the court properly accepted the plea. Appellant may not assign error to the acceptance of his plea of no contest by making exculpatory allegations of fact in an appelate brief. Assignment of error 3 is overruled.

The judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

ABELE, P.J. & STEPHENSON, J. CONCUR
IN JUDGMENT & OPINION

APPENDIX G

JUDGMENT ENTRY OF FEBRUARY 6, 1985, OF THE COURT OF APPEALS FOR ROSS COUNTY, OHIO

IN THE COURT OF APPEALS OF ROSS COUNTY, OHIO

State of Ohio,

Plaintiff-Appellee, No. 1075

vs.

Robert Mankin, Sr., JUDGMENT ENTRY

Defendant-Appellant

This cause came on to be heard upon the appeal on consideration of law, assignments of error, the record from the Court of Common Pleas of Ross County, and was submitted to the court on the briefs.

Upon consideration thereof, the court finds that the assignments of error are not well taken for the reasons set forth in the opinion filed herein and made a part thereof.

It is therefore ordered by the court that the judgment of the trial court be, and the same is hereby affirmed.

It is further ordered that a mandate be sent to the Court of Common Pleas of Ross County for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further ordered that a certified copy of this judgment, with a copy of the opinion attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellant, by counsel, excepts.

/s/ Homer E. Abele, Presiding Judge

Homer E. Abele, Presiding Judge

APPENDIX H

ENTRY AND ORDER OF THE SUPREME COURT OF THE STATE OF OHIO OF APRIL 17, 1985

THE SUPREME COURT OF OHIO, COLUMBUS

1985 TERM

To wit: April 17, 1985

State of Ohio,	:	
Appellee,	:	Case No. 85-339
v.	:	ENTRY
Robert Mankin, Sr.,	:	
Appellant.	:	

Upon consideration of the motion for an order directing the Court of Appeals for Ross County to certify its record and the claimed appeal as of right from same said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:
Motion Fee, $20.00, paid by J. Donald Ratcliff.

/s/ Frank D. Celebrezze
FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date _____.

/s/ James Wm. Kelly CLERK

/s/ Sam F. Adkins DEPUTY

APPENDIX I - CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Appendix I-1- U.S. Constitution, amendment IV
Appendix I-2- U.S. Constitution, amendment XIV, Section 1
Appendix I-3- 18 U.S.C. §2510 (1), (2), (4), and (11)
Appendix I-4- 18 U.S.C.§2515
Appendix I-5- 18 U.S.C.§2518 (10)(a)
Appendix I-6- Rule 12, Ohio Rules of Criminal Procedure

APPENDIX I-1: U.S. CONSTITUTION, AMENDMENT IV

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX I-2: U.S. CONSTITUTION AMENDMENT XIV, SECTION 1

AMENDMENT XIV (1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX I-3: 18 U.S.C.§2510

§2510. Definitions

As used in this chapter (18 USCS §§2510 et seq.)–

(1) "Wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of inerstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an exception that such communication is not subject to interception under circumstances justifying such expectation;

. . . . . .

. . . . . .

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

. . . . . .

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

APPENDIX I-4: 18 U.S.C. §2515

§2515. Prohibition of use as evidence of intercepted wire or oral communications.

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.
(18 USCS §§2510 et seq.)

APPENDIX I-5: 18 U.S.C. §2518 (10) (a)

§2518. Procedure for interception of wire or oral communications.

* * * * * * * * * * * *

(10) (a) Any agrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter (18 USCS §§ 2510 et seq.), or evidence derived therefrom, on the grounds that–

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter (18 USCS §§2510 et seq.). The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communications or evidence derived therefrom as the judge determines to be in the interests of justice.

APPENDIX I-6; RULE 12
OHIO RULES OF CRIMINAL PROCEDURE

RULE 12. Pleadings and Motions Before Trial: Defenses and Objections

(A) Pleadings and motions. Pleadings in criminal proceedings shall be the complaint, and the indictment or information, and the pleas of not guilty, not guilty by reason of insanity, guilty, and no contest. All other pleas, demurrers, and motions to quash, are abolished. Defenses and objections raised before trial which heretofore could have been raised only by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(B) Pretrial motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. The following must be raised before trial:

(1) Defenses and objections based on defects in the institution of the prosecution;

(2) Defenses and objections based on defects in the indictment, information, or complaint (other than failure to show jurisdiction in the court or to charge an offense, which objections shall be noticed by the court at any time during the pendency of the proceeding);

(3) Motions to suppress evidence, including but not limited to statements and identification testimony, on the ground that it was illegally obtained. Such motions shall be filed in the trial court only;

(4) Requests for discovery under Rule 16;

(5) Requests for severance of charges or defendants under Rule 14.

(C) Motion date. All pretrial motions except as provided in Rule 7(E) and Rule 16(F) shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier. The court in the interest of justice may extend the time for making pretrial motions.

(D) Notice by the prosecuting attorney of the intention to use evidence.

(1) At the discretion of the prosecuting attorney. At the arrignment or as soon thereafter as is practicable, the prosecuting attorney may give notice to the defendant of his intention to use specified evidence at trial, in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subsection (B)(3).

(2) At the request of the defendant. At the arraignment or as soon thereafter as is practicable the defendant may, in order to raise objections prior to trial under subsection (B)(3), request notice of the prosecuting attorney's intention to use evidence in chief at trial, which evidence the defendant is entitled to discover under Rule 16.

(E) Ruling on motion. A motion made before trial other than motion for change of venue, shall be timely determined before trial. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(F) Return of tangible evidence. Where a motion to suppress tangible evidence is granted, the court upon request of the defendant shall order the property returned to the defendant if he is entitled to lawful possession thereof. Such order shall be stayed pending appeal by the state pursuant to Rule 12(J).

(G) Effect of failure to raise defenses or objections. Failure by the defendant to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (C), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for good cause shown may grant relief from the waiver.

(H) Effect of plea of no contest. The plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence.

(I) Effect of determination. If the court grants a motion to dismiss based on a defect in the institution of the prosecution or in the indictment, information, or complaint, it may also order that the defendant be held in custody or that his bail be continued for a specified time not exceeding fourteen days, pending the filing of a new indictment, information, or complaint. Nothing in this rule shall affect any statute relating to periods of limitations. Nothing in this rule shall affect the state's right to appeal an adverse ruling on a motion under subsections (B)(1) or (2), when such motion raises issues which were formerly raised pursuant to a motion to quash, a plea in abatement, a demurrer, or a motion in arrest of judgment.

(J) State's right of appeal upon granting of motion to return property or motion to suppress evidence. The state may take an appeal as of right from the granting of a motion for the return of seized property, or from the granting of a motion to suppress evidence if, in addition to filing a notice of appeal, the prosecuting attorney certifies that: (1) the appeal is not taken for the purpose of delay; and (2) the granting of the motion has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed.

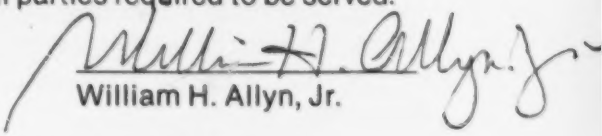
Such appeal shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the trial court within seven days after the date of the entry of the judgment or order granting the motion. Any appeal taken under this rule shall be diligently prosecuted.

If the defendant has not previously been released, he shall, except in capital cases, be released from custody on his own recognizance pending such appeal when the prosecuting attorney files the notice of appeal and certification.

This appeal shall take precedence over all other appeals.

CERTIFICATE OF SERVICE

The undersigned, William H. Allyn, Jr., attorney for Robert Mankin, Sr., and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the 14th day of June, 1985, I served by mailing, in duly addressed envelopes with first class postage prepaid, three (3) copies of the foregoing Petition for Writ of Certiorari on Richard G. Ward, Prosecuting Attorney, 20 South Paint Street, Chillicothe, Ohio 45601, attorney for the State of Ohio, being all parties required to be served.



William H. Allyn, Jr.

Attorney at Law
75 West Second Street
Chillicothe, Ohio 45601
(614) 773-5534

AFFIDAVIT OF FILING

State of Ohio :
ss.
County of Ross:

William H. Allyn, Jr., being first duly cautioned and sworn, deposes and says:

1. That he is a member in good standing of the Bar of the Supreme Court of the United States;

2. That he is the attorney of record for Robert Mankin, Sr., petitioner;

3. That this affidavit is submitted pursuant to Rule 28.2 of the Rules of Practice of the above said Court;

4. That on the day of June, 1985, he deposited in the United States Post Office in Chillicothe, Ohio, with first class postage prepaid, and properly addressed to the Clerk, Supreme Court of the United States, Washington, D.C. 20543, forty (40) copies of a Petition for Writ of Certiorari on behalf of Robert Mankin, Sr., and,

5. That such mailing took place within the time permitted for the filing of such petition.

_____
William H. Allyn, Jr.

Sworn to before me and subscribed in my presence this day of June, 1985.

_____
Notary Public